IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4620 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHETH ANANDJI KALYANJI & 1 - Petitioner(s)
Versus
AJITKUMAR DIPSINH BAROT - Respondent(s)

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Appearance :
MR SACHIN D VASAVADA for Petitioner(s) : 1 - 2.
MR RAJESH P MANKAD for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 04/12/2007

ORAL JUDGMENT

1. Heard learned Advocate Mr. Sachin D. Vasavada for the petitioner and Mr. Rajesh P. Mankad, learned Advocate for the respondent workman. The respondent workman Ajitkumar Dipsinh Barot has remained personally present before this Court.
2. Through this petition, the petitioner trust has challenged the award made by the labour court, Ahmedabad in Reference No. 20 of 1990 dated 5th February, 2004 wherein the labour court has set aside the termination order and granted full back wages for interim period with effect from 4th March, 1997 with costs of Rs.500.00.
3. Learned Advocate Mr. Vasavada appearing for the petitioner submits that immediately after publication of the impugned award, petitioner has offered reinstatement to the respondent workman and with effect from1st July 2004, respondent was reinstated in service at Junagadh by providing him residential accommodation without charge and respondent has reported for

work and at present, respondent is working with the petitioner trust. He submits that as the reinstatement order has been fully complied with by the petitioner trust by reinstating the petitioner, petitioner is not challenging the award of reinstatement of the petitioner but the petitioner is having grievance in respect of the back wages awarded by the labour court with effect from 4th March, 1997 till the date of reinstatement which is 100 per cent back wages as awarded by the labour court. He submits that the services of the respondent workmen were terminated on 10.7.1989 and immediately dispute was raised by the workman in the year 1990 and lastly he was appointed on 30th January, 1989 and at that time, he was drawing the wages of Rs.510.00. He submits that before the reinstatement of the respondent workman by the petitioner pursuant to the award of the labour court, the respondent was working with Sheth Narshi Natha Charitable Trust Fund with effect from 1st October, 2002 as a permanent Pujari and was getting salary of Rs.1540/- per month. As

per his submission, no doubt, said facts were not brought to the notice of the labour court and could not be placed before the labour court to show that the respondent was not remaining without work during the interim period for curtailing the scope of back wages. He submits that the petitioner trust is a religious charitable trust receiving donations and except that, the petitioner is having no other income from any other source and, therefore, this court may consider the nature of the trust and the activities carried out by the trust while considering the question of back wages. In support of these submissions, reliance was placed by him on the decision of the Hon'ble apex court in case of **Divisional Controller GSRTC and Kadarbhai J.Suthar, reported in 2007-I-LLJ page 1046**.

4. On the other hand, learned Advocate Mr.Rajesh P. Mankad appearing for the workman has submitted that before the labour court, no gainful employment of the workman was proved by the petitioner and therefore, petitioner is entitled

for full back wages for interim period and labour court was right in granting the back wages. He submits that the documents which have been placed by the petitioner before this court were not produced by the petitioner before the labour court in reference proceedings and they have been produced before this court for the first time and, therefore, same cannot be taken into consideration while examining the award of reinstatement qua back wages. However, he submitted that at the relevant time, respondent was receiving meagre amount of salary of Rs.510.00 for the work which he was performing and at present, he is receiving salary of Rs.3500.00 per month.

5. I have considered the submissions made by the learned advocates for both the parties.I have also perused the award made by the labour court. I have also considered the averments made by the petitioner in the memo of petition and the documents annexed to the petition.

6. Since the petitioner is not challenging the award qua reinstatement, short question arising

for consideration of this court is, whether the respondent workman is entitled for back wages or not and if yes, then, for how much period, he is entitled for the same?

7. Looking to the facts as emerging from the record, the services of the respondent workman were terminated on the basis of the allegation that while he was on duty, two gold ornaments worth Rs.1002.00 had been received by way of donation for which the second party workman had not issued receipt and no any intimation about receipt of the donation had been given to the Manager and when the information about the said donation had been received from the donour, on 19.6.1989, upon inquiry, second party workman had made admission about the receipt of the article and amount and therefore, based upon the said allegation, services of the respondent workman were terminated by the petitioner trust against which the workman raised industrial dispute which was in turn referred to for adjudication to the labour court.

8. Labour court considered that in respect of the

allegation made against the second party workman, no show cause notice was served on the respondent by the petitioner. Therefore, ultimately, labour came to the conclusion that the termination is contrary to the principles of natural justice as no departmental inquiry was initiated against the respondent. No doubt, on facts, labour court is having finding that on the date on which the donour donated the amount and gold ornaments, Manager/Munim was on leave. However, the question which is relevant is the ground on which the labour court set aside the order of termination of services of the respondent workman and that is, that the termination was effected without departmental inquiry and, therefore, it has been held that the order of termination is passed in breach of the principles of natural justice and, therefore, based upon such findings, labour court passed the award in question. However, since the petitioner is not challenging that part of the award as submitted by learned Advocate Mr. Sachin D. Vasavada, therefore, this

question is not material, to be decided by this court as that part is not challenged by the petitioner and, therefore, this court is confirming the award in question in so far as it relates to reinstatement of the workman. However, I am examining the question of back wages in light of the fact that the termination has been held to be invalid because it was violative of the principles of natural justice. While examining this aspect of the matter, labour court has observed that in the matter of the year 1990, workman had given deposition in the form of affidavit on 4.3.1997 and thus, second party workman has given such deposition before the labour court after seven years from the date of filing of reference before the labour court deposing that he has been unemployed. No oral and/or documentary evidence was produced by the petitioner before the labour court to show that the workman had been gainfully employed during the interim period and, therefore, second party is entitled for getting back wages from the first party with

effect from 4.3.1997. Thus, no back wages for the period prior to 4.3.1997 have not been awarded by the labour court. It is relevant to be noted that if the workman would have been really unemployed and had been facing hardship/starvation, then, he should not have waited for a period upto 7 years for giving evidence before the labour court but he ought to have rushed immediately before the labour court because deposition in the form of affidavit was given by the workman before the labour court in 1997. Thus, workman remained silent for about seven years, meaning thereby, he was happy with the situation and not bothered for the unemployment. Similarly, that logic would apply to subsequent period from 1997 onward as per the affidavit filed by the petitioner pointing out the fact that the workman was permanent employee of Sheth Narshi Natha Charitable Trust Fund with effect from 1st October, 2002. Therefore, considering entire matter while keeping in mind the object of the trust and activities carried out by the trust and also considering the fact

that the trust is receiving donations and having no other income and the workman is also working with the trust and he had remained unemployed from 1990 to some extent according to my opinion, award of back wages made by the labour court is required to be modified by this court as per the decision of the apex court in Divisional Controller GSRTC and **Kadarbhai J.Suthar, reported in 2007-I-LLJ page 1046**. In para 6, 7 and 8 of the said decision, apex court observed as under:

> "6. When fixing the back wages, several factors need to be noted. It is a well settled position in law that on the finding that termination was not lawful, there is no automatic entitlement to full back wages. In Hindustan Tin Works P. Ltd. v. Employees of Hindustan Tin Works P. Ltd. & Ors. AIR 1979 SC 75, a three Judge Bench of this Court laid down at p. 478 of LLJ:
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> '11. In the very nature of things there cannot be a straight-jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage, the Tribunal will exercise its discretion keeping in view all the

relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reasons and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular (See Susannah Sharp v.Wakefield (1981) AC 173, 179).

7. In PGI of Medical Education and Research Chandigarh v.Rajkumar AIR 2001 SC 479, this Court found fault with the High Court in setting aside the award of the Labour Court which restricted the back wages to 60% and directing payment of full back wages. It was observed thus:

"The Labour Court being the final Court of facts came to a conclusion that payment of 60% back wages would comply with the requirement of law. The finding of perversity or being erroneous or not in accordance with law shall have to be recorded with reasons in order to assail the finding of the Tribunal or the Labour Court. It is not for the High Court to go into the factual aspects of the matter and there is an existing limitation on the High Court to that affect."

Again at paragraph 12, this Court observed at p. 548 of LLJ:

"12. Payment of back wages having a discretionary element involvement in it has to be dealt with in the facts and circumstances of each case and no strait jacket formula can be evolved,though, however, there is statutory sanction to direct payment of back wages in its

entirety.'
[See Hindustan Motors v. Tapan Kumar Bhattacharya & Anr. 2002 II LLJ 1156 (SC)].

8. Additionally, the Labour Court had taken note of the previous acts of misconduct by the workman while denying the back wages. That aspect wsa completely lost sight of by the learned Single Judge as well as the Division Bench. Merely because the Corporation did not challenge the order of reinstatement, that does not lead to a conclusion that it accepted any illegality in the departmental proceedings. As a matter of fact, the Labour Court clearly noted that the workman admitted the legality and propriety of the inquiry held against him.

9. Therefore, in view of the peculiar facts of the present case wherein the petitioner was not vigilant enough for assisting the labour court to examine the case appropriately on the question of back wages and also considering the decision of the apex court as referred to above, there cannot be any straight jeckt formula for granting back wages for interim period because it depends upon the facts and circumstances of each case, therefore, considering the entire matter and the back ground and also keeping in mind the coordial relationship to be maintained between the petitioner and respondent, according

to my opinion, it would be just and proper if back wages from the date of evidence 4th March, 1997 to 1st October, 2002 is awarded at the rate of 40 % instead of full back wages as has been awarded by the labour court from 4th March, 1997 and that would met ends of justice between the parties. Accordingly award made by the labour court in Reference No. 20/90 dated 5th February, 2004 is hereby modified to the effect that the reinstatement granted by the labour court has been confirmed by this court and petitioner shall have to pay 40 per cent back wages for interim period from 4th March, 1997 to 1st October, 2002 as expeditiously as possible, preferably within the period of six weeks from the date of receipt of copy of this order. Rule is made absolute to the extent indicated herein above with no order as to costs. After completion of this order, request was made by the learned Advocate Mr. RP Mankad on behalf of the respondent workman that let the petitioner may think over about transfer of the petitioner. As and when the vacancy and work is available at

Palitana, I hope that the petitioner will definitely consider the request of the learned Advocate Mr. RP Mankad as and when such occasion arise.

(H.K. Rathod,J.)

Vyas